A **TENAGA NASIONAL BHD**

v.

IRHAM NIAGA SDN BHD & ANOR

B COURT OF APPEAL, PUTRAJAYA
ABDUL MALIK ISHAK JCA
KANG HWEE GEE JCA
ABDUL WAHAB PATAIL JCA
[CIVIL APPEAL NO: W-02(IM)(NCC)-435-2010]
C 15 SEPTEMBER 2010

ARBITRATION: *Award - Enforcement - Arbitration proceedings between respondents and appellant's corporate subsidiary - Appellant excluded from such arbitration proceedings - Award made in favour of*
D *respondents against appellant's corporate subsidiary - Award registered in High Court by respondents against appellant's corporate subsidiary - No representation or undertaking that appellant would honour the award - Whether unjust and abuse of court's process to enforce such award against appellant - Whether veil of incorporation ought to be lifted to attach*
E *liability on appellant*

CIVIL PROCEDURE: *Estoppel - Estoppel by election - Nature of - Application and effect of*

CIVIL PROCEDURE: *Striking out - Action - Action to enforce*
F *arbitration award against appellant - Appellant excluded from arbitration proceedings - Award made against appellant's corporate subsidiary - Whether unjust and abuse of court's process to enforce such award against appellant - Whether action ought to be struck out*

G ***COMPANY LAW:*** *Separate legal entity - Lifting the veil of incorporation - Arbitration award made against appellant's subsidiary - Appellant not a party to the arbitration proceedings - Appellant's subsidiary a corporate body in its own right - Whether award enforceable against appellant - Whether corporate veil ought to be lifted to attach liability on*
H *appellant*

EQUITY: *Estoppel - Estoppel by election - Nature of - Application and effect of*

The respondents entered into several agreements with the appellant's
I subsidiary, TNBT. The appellant and TNBT subsequently sued the respondents over the agreements ('the first suit'). The respondents obtained an order to stay the first suit pending arbitration under

s. 6 of the Arbitration Act 1952. The order also excluded the appellant from the arbitration proceedings. After obtaining an award in their favour, the respondents commenced the instant action to enforce the award against the appellant. The appellant applied to strike out the respondents' action under O. 18 r. 19(1) of the Rules of the High Court 1980. The High Court dismissed the application and chose to deal with the merits at the trial of the respondents' action proper. The appellant thus appealed to the Court of Appeal. The respondents contended that the appellant was the controlling mind and the alter ego of TNBT. They constituted one economic unit. The veil of incorporation therefore ought to be lifted for the sake of justice to hold the appellant liable for the acts of TNBT, averred the respondents. Further, the appellant had committed fraud against the respondents by using TNBT as a contracting vehicle for its dealings and then attempting to evade liability, submitted the respondents.

Held (allowing the appeal with costs)
Per Abdul Malik Ishak JCA:

(1) On incorporation, a company becomes "a body corporate" with perpetual succession. Upon incorporation, a company assumes a legal status of its own and becomes an entity independent of or distinct from its members and directors. This is notwithstanding any control, however complete, exercised by any one or more of its members. *Salomon v. Salomon* (foll). (paras 32-43)

(2) In the instant case, it was untenable for the respondents to impose liability on the appellant when clearly the respondents' cause of action was against TNBT. The veil of incorporation could be lifted in the event of fraud but there was no fraud in the instant case. No particulars of fraud had been pleaded, apart from the respondents' mere reference to the appellant's fraud in their statement of claim. If the allegations of fraud were true, the respondents ought to have been aware of the alleged fraud at the time the agreements were executed or when the first suit was filed. Yet the respondents chose to affirm the agreements and pursue the matter through arbitration solely with TNBT. *Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor*, FC (dist); *Yap Sing Hock & Anor. v. Public Prosecutor* (dist); *Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors* (refd); *Wong Yew Kwan v. Wong Yu Ke & Anor* (foll). (paras 44-52)

(3) To allow the respondents to enforce the arbitration award against the appellant would be unjust and an abuse of the process of court. The High Court Judge made a wrong finding when he held that TNBT was used by the appellant to "evade liability" without the benefit of oral evidence. (para 53)

(4) The respondents knew TNBT was involved. They had registered the arbitrator's award against TNBT in the High Court. The appellant had never given the respondents a representation or undertaking that it would honour the arbitrator's award. The court could not ignore the rule in *Salomon*. If the appellant was held liable to make payment to the respondents for the award against TNBT, the rule in *Salomon* would be disregarded or forgotten. The appellant was entitled to use TNBT as a subsidiary to enter into a contract. It was perfectly legitimate and nothing sinister could be read into it. Whether it was morally wrong or otherwise was totally immaterial. (paras 54-64)

(5) The respondents were estopped from bringing the instant action. They had elected to stay the first suit and refer the matter to arbitration. Such election meant that: (i) the appellant was deprived from proceeding with its cause of action against the respondents in the first suit; and (ii) the appellant was deprived of the opportunity to participate in the arbitration proceedings. Since the appellant was not a party to the arbitration proceedings and did not participate in such proceedings, the appellant could not be asked to pay for the final award handed down by the arbitrator. There was thus a clear breach of natural justice. (paras 65-81)

Bahasa Malaysia *Translation Of Headnotes*

Responden-responden telah menandatangani beberapa perjanjian dengan subsidiari perayu, TNBT. Perayu dan TNBT kemudiannya menyaman responden-responden mengenai perjanjian-perjanjian tersebut ('guaman pertama'). Responden-responden memperolehi perintah untuk menangguhkan guaman pertama sementara menunggu timbangtara di bawah s. 6 Akta Timbang Tara 1952. Perintah itu juga mengecualikan perayu dari prosiding timbangtara. Selepas memperolehi award yang memihak kepada mereka, responden-responden memulakan tindakan semasa untuk menguatkuasakan award tersebut terhadap perayu. Perayu memohon

untuk membatalkan tindakan responden-responden di bawah A. 18 k. 19(1) Kaedah-Kaedah Mahkamah Tinggi 1980. Mahkamah Tinggi menolak permohonan itu dan memilih untuk menimbangkan merit pada perbicaraan sebenarnya tindakan responden-responden. Perayu oleh itu merayu ke Mahkamah Rayuan. Responden-responden menghujah bahawa perayu adalah minda dan alter ego yang mengawal TNBT. Mereka merupakan satu unit ekonomik. Tabir penubuhan oleh yang demikian harus diketepikan bagi tujuan keadilan untuk menjadikan perayu bertanggungjawab atas tindakan-tindakan TNBT, responden-responden mengatakan. Lagipun, perayu telah melakukan frod terhadap responden-responden dengan menggunakan TNBT sebagai alat penjanji untuk urusan-urusannya dan selepas itu cuba mengelak dari liabiliti, responden-responden menghujah.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Abdul Malik Ishak HMR:

(1) Selepas pemerbadanan, sebuah syarikat menjadi "suatu badan korporat" dengan kekal turun temurun. Selepas pemerbadanan, sebuah syarikat memegang status undang-undang sendirinya dan menjadi suatu entiti yang bebas dari atau berbeza dari ahli-ahli dan pengarah-pengarahnya. Ini adalah meskipun apa-apa kawalan, tidak kira betapa sepenuhnya, yang dilaksanakan oleh seorang atau lebih dari ahli-ahlinya. *Salomon v. Salomon* HL (diikuti).

(2) Dalam kes semasa, responden-responden tidak boleh mengenakan liabiliti atas perayu apabila jelasnya kausa tindakan responden-responden adalah terhadap TNBT. Tabir penubuhan boleh diketepikan jikalau ada kejadian frod tetapi tidak ada frod dalam kes semasa. Tiada butir-butir frod yang telah diplidkan, selain dari rujukan responden sahaja kepada frod perayu di dalam pernyataan tuntutan mereka. Jika pengataan frod adalah benar, responden-responden sepatutnya mengetahui tentang frod yang dikatakan pada masa perjanjian-perjanjian tersebut telah dilaksanakan ataupun pada masa guaman pertama difailkan. Walaupun begitu responden-responden memilih untuk mengesahkan perjanjian-perjanjian tersebut dan meneruskan perkara itu melalui timbangtara hanya dengan TNBT. *Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor*, FC (dibezakan); *Yap Sing Hock & Anor. v. Public Prosecutor* (dibezakan); *Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors* (dirujuk); *Wong Yew Kwan v. Wong Yu Ke & Anor* (diikuti).

(3) Untuk membenarkan responden-responden menguatkuasakan award timbangtara terhadap perayu adalah tidak adil dan merupakan suatu penyalahgunaan proses mahkamah. Hakim Mahkamah Tinggi telah membuat dapatan yang salah apabila beliau memutuskan bahawa TNBT telah digunakan oleh perayu untuk "mengelak dari liabiliti" tanpa faedah keterangan lisan.

(4) Responden-responden tahu TNBT terlibat. Mereka telah mendaftarkan award penimbangtara terhadap TNBT dalam Mahkamah Tinggi. Perayu tidak pernah memberi responden-responden suatu representasi atau akujanji bahawa ia akan menghormati award penimbangtara. Mahkamah mesti mengendahkan kanun dalam *Salomon*. Jika perayu didapati bertanggungjawab untuk membuat pembayaran kepada responden-responden bagi award terhadap TNBT, kanun dalam *Salomon* akan tidak dipedulikan atau dilupakan. Perayu berhak menggunakan TNBT sebagai subsidiari untuk menandatangani suatu kontrak. Ia adalah betul-betul sah dan tiada apa-apa yang mencurigakan tentangnya. Sama ada ia salah secara moral atau tidak langsung tidak material.

(5) Responden-responden diestop dari membawa tindakan semasa. Mereka telah memilih untuk menangguhkan guaman pertama dan merujuk perkara tersebut untuk timbangtara. Pemilihan sebegitu bermaksud bahawa: (i) perayu tidak dapat meneruskan kausa tindakannya terhadap responden-responden dalam guaman pertama; dan (ii) perayu dinafikan peluang untuk menyertai prosiding timbangtara. Oleh kerana perayu bukan pihak kepada prosiding timbangtara dan tidak menyertai prosiding sedemikian, perayu tidak boleh diminta membayar untuk award terakhir yang dicatatkan oleh penimbangtara. Oleh itu terdapat pelanggaran keadilan semulajadi.

Case(s) referred to:

Abdul Rahim Aki @ Mohd Haki v. Krubong Industrial Park (Melaka) Sdn Bhd & 5 Ors [1995] 4 CLJ 551 CA ***(refd)***

Adams and others v. Cape Industries plc and Another [1991] 1 All ER 929 ***(refd)***

Aron Salomon (Pauper) v. A Salomon and Company, Limited, A Salomon and Company, Limited v. Aron Salomon [1897] AC 22 ***(foll)***

Aspatra Sdn Bhd & Ors v. Bank Bumiputra (M) Bhd & Anor [1987] 2 CLJ 377; [1987] CLJ (Rep) 50 SC ***(refd)***

Bandar Builder Sdn Bhd & 2 Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Bank Bumiputra (M) Bhd & Anor v. Lorrain Esme Osman & Aspatra Sdn Bhd & Ors [1985] 1 CLJ 552; [1985] CLJ (Rep) 409 HC ***(refd)***

Banque des Marchands de Moscou (Koupetschesky) v. Kindersley and Another [1951] Ch 112 ***(refd)***

Barnes & Co Limited and others v. Sharpe and others [1910] 11 CLR 462 ***(refd)***

Boo Are Ngor v. Chua Mee Liang [2009] 6 CLJ 617 FC ***(refd)***

Catherine Lee v. Lee's Air Farming Ltd [1961] AC 12 ***(refd)***

Charles Osenton and Company v. Johnston [1942] AC 130 ***(refd)***

Chong Chin Kee v. Lee Song & Anor [1960] 1 LNS 13 HC ***(refd)***

Chong Siew Choong v. PP [1996] 2 CLJ 823 HC ***(refd)***

Development & Commercial Bank Bhd v. Lam Chuan Co & Anor [1989] 1 CLJ 192; [1989] 1 CLJ (Rep) 489 HC ***(refd)***

Ernst & Young v. Maxbiz Corporation Bhd [2008] 6 CLJ 136 CA ***(refd)***

Evans v. Bartlam [1937] 2 All ER 646 ***(refd)***

Ex parte Robertson, In re Morton [1875] LR 20 Eq 733 ***(refd)***

Goh Hooi Yin v. Lim Teong Ghee & Ors [1975] 1 LNS 44 HC ***(refd)***

Hew Sook Ying v. Hiw Tin Hee [1992] 3 CLJ 1325; [1992] 1 CLJ (Rep) 120 SC ***(refd)***

Honan Plantations Sdn Bhd v. Kerajaan Negeri Johor & Anor [1998] 3 CLJ 253 CA ***(refd)***

Hotel Jaya Puri Bhd v. National Union of Hotel, Bar & Restaurant Workers & Anor [1979] 1 LNS 32 HC ***(refd)***

In re The Sheffield and South Yorkshire Permanent Building Society In Liquidation [1889] 22 Ch 470 ***(refd)***

John Shaw and Sons (Salford), Limited v. Peter Shaw and John Shaw [1935] 2 KB 113 ***(refd)***

Kesultanan Pahang v. Sathask Realty Sdn Bhd [1998] 2 CLJ 559 FC ***(refd)***

Koh Hoe Peng v. Central Development Ltd [1982] 1 LNS 77 CA ***(refd)***

Lam Kee Ying Sdn Bhd v. Lam Shes Tong & Anor [1974] 1 LNS 65 PC ***(refd)***

Lam Shes Tong & Ors v. Lam Kee Ying Sdn Bhd [1972] 1 LNS 59 FC ***(refd)***

Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors [2005] 3 CLJ 355 CA ***(refd)***

Lee Eng Eow v. Mary Lee & Anor [1999] 3 CLJ 143 CA ***(refd)***

Lion Engineering Sdn Bhd v. Pauchuan Development Sdn Bhd [1998] 3 CLJ Supp 450 HC ***(refd)***

Lissenden v. C.A.V. Bosch, Limited [1940] AC 412 ***(refd)***

Littlewoods Mail Order Stores Ltd v. Inland Revenue Commissioners, Same v. McGregor (Inspector of Taxes) [1969] 1 WLR 1241 ***(refd)***

Malayan Banking Bhd v. The International Tin Council & Anor & Another Case [1989] 2 CLJ 961; [1989] 1 CLJ (Rep) 87 SC ***(refd)***

Malaysia Shipyard & Engineering Sdn Bhd v. Bank Kerjasama Rakyat (M) Bhd [1985] 2 CLJ 427; [1985] CLJ (Rep) 206 SC ***(refd)***

A *MBf Holdings Bhd v. Emtex Corporation Bhd [1985] 1 LNS 100 SC* ***(refd)***
Meng Leong Development Pte Ltd v. J.I.P. Hong Trading Co Pte Ltd [1985] 1 CLJ 20; [1985] CLJ (Rep) 8 PC ***(refd)***
Mills v. Duckworth [1938] 1 All ER 318 ***(refd)***
Nagubai Ammal and Others v. B Shama Rao and Others [1956] AIR SC 593 ***(refd)***
B *Oh, Thevasa v. Sia Hok Chai [1992] 1 CLJ 170; [1992] 3 CLJ (Rep) 148 HC* ***(refd)***
Pacific Internet Ltd v. Catcha.com Pte Ltd [2000] 3 SLR 26 ***(refd)***
Pek Seng Co Pte Ltd & Ors v. Low Tin Kee & Ors [1989] 1 LNS 175 HC ***(refd)***
C *People's Insurance Co (M) Sdn Bhd v. People's Insurance Co Ltd & Ors [1985] 1 LNS 158 HC* ***(refd)***
Perbadanan Pembangunan Bandar v. Syabas Holdings Sdn Bhd [1990] 1 CLJ 805; [1990] 2 CLJ (Rep) 614 HC ***(refd)***
Pilba Trading & Agency v. South East Asia Insurance Bhd & Anor [1999] 8 CLJ 403 HC ***(refd)***
D *Raja Zainal Abidin Raja Haji Tachik & Ors v. British-American Life & General Insurance Bhd [1993] 3 CLJ 606 SC* ***(refd)***
Ratnam v. Cumarasamy & Anor [1964] 1 LNS 237 PC ***(refd)***
Re Chi Liung & Son Ltd; Tong Chong Fah v. Tong Lee Hwa & Ors [1967] 1 LNS 145 HC ***(refd)***
E *Re Fletcher's Settlement Trusts, Medley v. Fletcher [1936] 2 All ER 236* ***(refd)***
Re Salvage Engineers Limited [1962] 1 LNS 167 HC ***(refd)***
Rosenfeld v. Newman and Others [1953] 2 All ER 885 ***(refd)***
Rubber Improvement Ltd and Another v. Daily Telegraph Ltd, Same v. Associated Newspapers Ltd [1964] AC 234 ***(refd)***
F *Slough Estates, Ltd v. Slough Borough Council and Another (No 2) [1969] 2 Ch 305* ***(refd)***
South Hetton Coal Company, Limited v. North-Eastern News Association Limited [1894] 1 QB 133 ***(refd)***
Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor [1997] 1 CLJ 529 FC ***(dist)***
G *Tan Ah Tong v. Perwira Affin Bank Bhd & Ors [2001] 7 CLJ 500 HC* ***(refd)***
Tan Guan Eng & Anor v. Ng Kweng Hee & Ors [1991] 3 CLJ 1881; [1991] 4 CLJ (Rep) 74 HC ***(refd)***
Tan Tien Kok v. Medical Specialist Centre (JB) Sdn Bhd [1994] 4 CLJ 597 HC ***(refd)***
H *Tan Lai v. Mohamed Mahmud & Ors [1982] CLJ 201; [1982] CLJ (Rep) 800 HC* ***(refd)***
The King v. Taylor, The King v. Amendt [1915] 2 KB 593 ***(refd)***
Tinkler v. Hilder [1849] 4 Exch 187 ***(refd)***
I *United Australia, Limited v. Barclays Bank, Limited [1941] AC 1* ***(refd)***

Verschures Creameries, Limited v. Hull and Netherlands Steamship Company, Limited [1921] 2 KB 608 ***(refd)***
Wong Yew Kwan v. Wong Yu Ke & Anor [2010] 2 CLJ 703 ***(foll)***
Yap Sing Hock & Anor v. PP [1992] 4 CLJ 1950; [1992] 1 CLJ (Rep) 356 SC ***(refd)***
Yap Sing Hock & Anor v. PP [1993] 1 BLJ 35 SC ***(dist)***

Legislation referred to:
Arbitration Act 1952, s. 6
Companies Act 1965, s. 16(5)
Rules of the High Court 1980, O. 18 r. 19(1)(b), (c), (d)

For the appellant - Robert Lazar (Rodney Gomez with him); M/s Shearn Delamore & Co
For the respondents - Wong Chong Wah (Lim Koon Huan with him); M/s Skrine

[Appeal from High Court, Kuala Lumpur; Suit No: D-22NCC-183-2009]

Reported by Andrew Christopher Simon

JUDGMENT

Abdul Malik Ishak JCA:

Introduction

[1] By way of a summons in chambers, the appellant (TNB) filed an application to strike out the respondents' writ of summons and the statement of claim dated 30 September 2009 against the appellant (TNB) pursuant to O. 18 r. 19(1)(b), (c) and/or (d) of the Rules of the High Court 1980 ("RHC") and/or the inherent jurisdiction of the court.

[2] The appellant's (TNB's) application was heard by the learned judge of the High Court and his Lordship dismissed the appellant's (TNB's) application with costs. The appellant (TNB) was also ordered to pay the respondents' fixed costs of RM10,000. His Lordship too ordered an early trial.

[3] Aggrieved by that decision, the appellant (TNB) now appeals to this court.

A **Striking Out Under O. 18 r. 19(1) Of The RHC**

[4] The courts have a discretionary power to strike out an action summarily in the following instances:

B (a) in plain and obvious cases (*Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7, SC);

(b) where the plaintiffs'/respondents' suit is an abuse of the process of the court (*Boo Are Ngor v. Chua Mee Liang* [2009] 6 CLJ 617, FC); and

C

(c) when the plaintiffs'/respondents' claim cannot be maintained in law and the court possesses an inherent jurisdiction to prevent an abuse of its process (*Raja Zainal Abidin bin Raja Haji Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606, SC).

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[5] The same legal principles on striking out can be seen in the following cases:

(a) *Honan Plantations Sdn Bhd v. Kerajaan Negeri Johor & Anor* E [1998] 3 CLJ 253, C.A.;

(b) *Tan Ah Tong v. Perwira Affin Bank Bhd & Ors* [2001] 7 CLJ 500, HC;

F (c) *Oh, Thevasa v. Sia Hok Chai* [1992] 1 CLJ 170; [1992] 3 CLJ (Rep) 148, HC;

(d) *Pacific Internet Ltd v. Catcha.com Pte Ltd* [2000] 3 SLR 26, HC; and

G (e) *Ernst & Young v. Maxbiz Corporation Bhd* [2008] 6 CLJ 136, CA.

[6] We are aware that an appellate court will not interfere with the exercise of discretion by the judge in chambers unless it is clear H that the judge's discretion was wrongly exercised. This simple proposition of law can be distilled from the following cases:

(a) *Evans v. Bartlam* [1937] 2 All ER 646, HL, at p. 650, per Lord Atkin:

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> Appellate jurisdiction is always statutory; there is in the statute no restriction upon the jurisdiction of the Court of Appeal, and, while the appellate court, in the exercise of its appellate power, is no doubt entirely justified in saying that

normally it will not interfere with the exercise of the judge's discretion except on grounds of law, yet, if it sees that, on other grounds, the decision will result in injustice being done, it has both the power and the duty to remedy it.

(b) *Ratnam v. Cumarasamy & Anor* [1964] 1 LNS 237; [1965] 31 MLJ 228, PC, at p. 229, per Lord Guest:

> The principles upon which a court will act in reviewing the discretion exercised by a lower court are well settled. There is a presumption that the judge has rightly exercised his discretion (*Charles Osenton and Company v. Johnston* [1942] AC 130, per Lord Wright at 148). The court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice (*Evans v. Bartlam* [1937] AC 473). Upon questions of procedure the Board is slow to interfere with the discretion exercised by a local court (*Mayor of Montreal v. Brown & Anor* [1876] 2 App. Cas. 168).

(c) *Charles Osenton and Company v. Johnston* [1942] AC 130, HL, at p. 138, per Viscount Simon LC:

> The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified.

[7] We categorically say that an application to strike out, like the present case at hand, should be dealt with before a trial. Indeed this is the view of the Federal Court in *Boo Are Ngor v. Chua Mee Liang (supra)* as seen in the judgment of Zulkefli Ahmad Makinuddin FCJ at p. 624 where his Lordship said:

> But such an application must be refused after the action has been set down for trial.

[8] And contrary to settled law, the learned judge of the High Court refused to consider the merits of the application to strike out filed by the appellant (TNB) and his Lordship preferred to deal with it at the trial proper. It is our judgment, that the merits of the striking out application filed by the appellant (TNB) should be considered by the learned judge of the High Court forthwith and not to delay it any further.

The Brief Background Facts

[9] Within a short compass, the facts may be stated as follows.

[10] The respondents entered into five (5) different agreements with a company known as TNB Transmission Network Sdn Bhd ("TNBT") between the years 2001 to 2002 (hereinafter referred to as the "5 agreements"). TNBT was a subsidiary of the appellant (TNB).

[11] The appellant (TNB) and TNBT then instituted a civil action against the respondents in the Shah Alam High Court *vide* civil suit number MT3-22-323-2004 (hereinafter referred to as the "original suit") in relation to the five agreements. The appellant (TNB) in the original suit sought for the release of its equipments that were stored at the respondents' warehouse.

[12] The respondents then applied to stay the original suit pursuant to s. 6 of the Arbitration Act 1952. The respondents succeeded in obtaining an order (hereinafter referred to as the "order") dated 23 March 2005 to stay the original suit and to refer to arbitration the disputes arising under the five agreements but confining itself to the disputes between the respondents and TNBT. The effect of that order was this. That the appellant (TNB) was excluded from the arbitration proceedings and the appellant's (TNB's) action against the respondents under the original suit was stayed.

[13] The arbitration between the respondents and TNBT was duly concluded and the final award by the arbitrator was published on 3 October 2007. The final award favoured the respondents as opposed to TNBT. And the final award was registered on 22 July 2009 in the Kuala Lumpur High Court *vide* civil suit number R2(R4)-24-80-2007.

[14] Armed with that arbitration award, the respondents now instituted the present suit against the appellant (TNB) claiming the following prayers:

(a) the sum of RM106,888,499.34 to be paid by the appellant (TNB) to the first respondent as set out in the final award;

(b) the sum of RM6,102,922.50 to be paid by the appellant (TNB) to the second respondent as set out in the final award;

(c) the respondents further claimed for:

(i) accrued interest on the final award at 8% per annum from 19 April 2004 on the amounts due in (a) and (b) respectively to the date of full payment;

(ii) costs of the arbitration amounting to RM75,095.50;

(iii) costs awarded by the High Court in Kuala Lumpur High Court Originating Motion number R4-25-336-2007 in the sum of RM10,000;

(iv) costs awarded by the High Court in Kuala Lumpur High Court Originating Summons number R2(R4)-24-80-2007 in the sum of RM2,000;

(v) costs of these proceedings; and

(vi) further and other relief as this Honourable Court deems fit and just.

Analysis

[15] Learned counsel for the respondents argued that the appellant (TNB) was now trying to avoid or evade its liability to pay an arbitration award dated 3 October 2007 handed down by the arbitrator.

[16] Learned counsel for the respondents further argued that the appellant (TNB) is and was at all material times the controlling and directing mind, the alter ego of and the party who has the effective control of TNBT, and that the veil of incorporation of TNBT must, in the interest of justice be lifted to hold the appellant (TNB) personally liable for the acts and liabilities of TNBT.

[17] Learned counsel for the respondents also argued that the learned judge of the High Court was correct when his Lordship held that the respondents, *prima facie* has an arguable case against the appellant (TNB) and that it was obvious from the facts of the case that the respondents' case against the appellant (TNB) was obviously sustainable and that the pleadings filed herein disclosed some cause of action or raised some question fit to be decided by his Lordship.

[18] Learned counsel for the respondents submitted that the appeal ought to be dismissed with costs for the following reasons:

(i) that the respondents have a valid, reasonable and legitimate cause of action against the appellant (TNB);

(ii) that the respondents' current High Court suit against the appellant (TNB) and the arbitration are separate and distinct from each other and that the issue of estoppel or election would not apply;

(iii) that there was substantial evidence of the appellant's (TNB's) involvement, participation and control over its wholly owned subsidiary – TNBT, in every aspect of TNBT's actions, activities and decisions;

(iv) that the appellant (TNB) has committed fraud against the respondents by using TNBT as its contracting vehicle to pursue its rights and interests and at the same time conveniently disclaimed all liabilities accruing therefrom; and

(v) that there was no basis for the appellant's (TNB's) argument that they were "shut out" from the arbitration process when in actual fact the appellant (TNB) had been actively involved in all stages of the arbitration proceedings and that would include the registration of the final award as well as the failed attempt to set aside or remit the final award.

[19] By way of a rebuttal, learned counsel for the appellant (TNB) submitted that even if the allegations by the respondents were correct, no reasonable cause of action was disclosed in the respondents' statement of claim.

[20] We will now proceed to examine the statement of claim. We observed that paras. 24, 27, 31, 38, 40 and 47 of the statement of claim set out the five agreements. These five agreements showed that the respondents' contracts were with TNBT – the appellant's (TNB's) wholly owned subsidiary. The five agreements were not contracts between the respondents and the appellant (TNB).

[21] To compound the matter further, the arbitration proceedings were between the respondents and TNBT only. The appellant (TNB) was not involved.

[22] We noticed that para. 4 of the statement of claim was worded erroneously in this way:

> The plaintiffs' claim (referring to the respondents) against the defendant (referring to the appellant) is for an unpaid Award sum based on an arbitration award given by the learned Arbitrator ...

[23] In reality, the arbitration award was against TNBT and not the appellant (TNB).

[24] The sting of the respondents' claim against the appellant (TNB) can be seen at paras. 53 and 54 of the statement of claim. It is in these paragraphs that the respondents pleaded that the appellant (TNB) and its subsidiary TNBT operated as one economic unit. What the respondents were trying to convey was this. That TNBT and the appellant (TNB) are one and the same entity. And because of this, the respondents alleged that the appellant (TNB) is the alter ego of TNBT and, consequently, the veil of incorporation must be lifted.

[25] The English Court of Appeal in *Adams and Others v. Cape Industries plc and Another* [1991] 1 All ER 929, considered extensively the single economic unit argument. Slade LJ delivering the judgment of the English Court of Appeal (with a coram of Slade, Mustill and Ralph Gibson LJJ) aptly said at p. 1016:

> The 'single economic unit' argument
>
> There is no general principle that all companies in a group of companies are to be regarded as one. On the contrary, the fundamental principle is that 'each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate legal rights and liabilities': *The Albazero* [1975] 3 All ER 21 at 28, [1977] AC 774 at 807 per Roskill LJ.

A It is thus indisputable that each of Cape, Capasco, NAAC and CPC were in law separate legal entities. Mr Morison did not go so far as to submit that the very fact of the parent-subsidiary relationship existing between Cape and NAAC rendered Cape or Capasco present in Illinois. Nevertheless, he submitted that the court will, in appropriate circumstances, ignore the distinction in law between members of a group of companies treating them as one, and that broadly speaking, it will do so whenever it considers that justice so demands. In support of this submission, he referred us to a number of authorities.

C **[26]** Continuing at p. 1019, Slade LJ had this to say:

> Mr Morison described the theme of all these cases as being that where legal technicalities would produce injustice in cases involving members of a group of companies, such technicalities should not be allowed to prevail. We do not think that the cases relied on go nearly so far as this. As Sir Godfray Le Quesne submitted, save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of *Salomon v. A Salomon & Co Ltd* [1897] AC 22, [1895-9] All ER Rep 33 merely because it considers that justice so requires. Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities.

F **[27]** Continuing further at p. 1021, Slade LJ said in trenchant terms:

> In the light of the set-up and operations of the Cape group and of the relationship between Cape/Capasco and NAAC we see the attraction of the approach adopted by Lord Denning MR in the *DHN* case [1976] 3 All ER 462 at 467, [1976] 1 WLR 852 at 860 which Mr Morison urged us to adopt:
>
> > This group is virtually the same as a partnership in which all the three partners are companies.
>
> In our judgment, however, we have no discretion to reject the distinction between the members of the group as a technical point. We agree with Scott J that the observations of Robert Goff LJ in *Bank of Tokyo Ltd v. Karoon* [1986] 3 All ER 468 at 486, [1987] AC 45 at 64 are apposite:

> Counsel suggested beguilingly that it would be technical for us to distinguish between parent and subsidiary company in this context; economically, he said, they were one. But we are concerned not with economics but with law. The distinction between the two is, in law, fundamental and cannot here be bridged.

[28] Finally, in regard to the lifting of the veil of incorporation, Slade LJ approached it in this way (see p. 1026 of the report):

> Whether or not such a course deserves moral approval, there was nothing illegal as such in Cape arranging its affairs (whether by the use of subsidiaries or otherwise) so as to attract the minimum publicity to its involvement in the sale of Cape asbestos in the United States. As to condition (iii), we do not accept as a matter of law that the court is entitled to lift the corporate veil as against a defendant company which is the member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law. Mr Morison urged on us that the purpose of the operation was in substance that Cape would have the practical benefit of the group's asbestos trade in the United States without the risks of tortious liability. This may be so. However, in our judgment, Cape was in law entitled to organise the group's affairs in that manner and (save in the case of AMC to which special considerations apply) to expect that the court would apply the principle of *Salomon v. A Salomon & Co Ltd* [1897] AC 22, [1895-9] All ER Rep 33 in the ordinary way.

[29] It is the Registrar of Companies who, under s. 16 of the Companies Act 1965, is authorised to register a company and based on the memorandum and articles of the company, the Registrar of Companies will issue a certificate of the company's incorporation. According to the case of *Tan Lai v. Mohamed bin Mahmud & Ors* [1982] CLJ 201; [1982] CLJ (Rep) 800, the effect of these acts by the Registrar of Companies would create a "body corporate" capable forthwith of exercising the functions of an incorporated company. To put it differently, from the date of incorporation as specified in the certificate of incorporation, the subscribers to the memorandum together with such other persons as may from time to time become members, the company will be a body corporate based on the name as contained in the memorandum.

[30] Section 16(5) of the Companies Act 1965 explains the effect of incorporation. Upon incorporation, a company will be capable of exercising all the functions of an incorporated company. The company will have perpetual succession and a common seal with the necessary power to hold land but with commensurate liability on the part of the members to contribute to the assets of the company in the event the company is being wound up as is provided for in the Companies Act 1965 (*Lee Eng Eow v. Mary Lee & Anor* [1999] 3 CLJ 143, CA; and *Abdul Rahim bin Aki @ Mohd Haki v. Krubong Industrial Park (Melaka) Sdn Bhd & 5 Ors* [1995] 4 CLJ 551). It is trite that one of the most important effects of incorporation is this. That the company can sue and be sued in its corporate name (*People's Insurance Co (M) Sdn Bhd v. People's Insurance Co Ltd & Ors* [1985] 1 LNS 158).

[31] This court in *Lee Eng Eow v. Mary Lee & Anor (supra)* made reference to the case of *Aron Salomon (Pauper) v. A Salomon and Company, Limited, A. Salomon and Company, Limited v. Aron Salomon* [1897] AC 22, HL; and to the case of *Catherine Lee v. Lee's Air Farming Ltd.* [1961] AC 12, HL, and said at p. 148:

> In addition to the statutory effects of incorporation, there is also a fundamental difference between an incorporated and an unincorporated association, in that an incorporated association has a legal personality of its own apart from the persons who comprise it. The separate legal personality of a company is not specifically provided for in the Companies Act. Nevertheless, the whole scheme of the Act is predicated upon the company's separate existence ... This is elementary law.

[32] It must be borne in mind that there may be several people joining together to form a company, yet upon incorporation, a company becomes "a body corporate" with perpetual succession. Upon incorporation, a company assumes a legal status of its own and becomes an entity independent of or distinct from its members and directors. This is the basic principle that every lawyer should know. It has been repeated in a number of cases, namely:

(a) *Re Chi Liung & Son Ltd; Tong Chong Fah v. Tong Lee Hwa & Ors.* [1967] 1 LNS 145;

(b) *Development & Commercial Bank Bhd v. Lam Chuan Co & Anor* [1989] 1 CLJ 192; [1989] 1 CLJ (Rep) 489;

(c) *Goh Hooi Yin v. Lim Teong Ghee & Ors* [1975] 1 LNS 44;

(d) *Bank Bumiputra (M) Bhd & Anor v. Lorrain Esme Osman & Aspatra Sdn Bhd & Ors* [1985] 1 CLJ 552; [1985] CLJ (Rep) 409; and

(e) *Yap Sing Hock & Anor v. Public Prosecutor* [1992] 4 CLJ 1950; [1992] 1 CLJ (Rep) 356, SC.

[33] According to the case of *John Shaw and Sons (Salford), Limited v. Peter Shaw and John Shaw* [1935] 2 KB 113, a company is an entity distinct from its shareholders and directors. And according to *Pilba Trading & Agency v. South East Asia Insurance Bhd & Anor* [1999] 8 CLJ 403, a company is also distinct from its employees.

[34] But the effects of incorporation as set out in s. 16(5) of the Companies Act 1965 are not exhaustive. It does not mention the fundamental difference between an incorporated and an unincorporated association in that an incorporated association has a legal personality of its own apart from the persons who comprise it.

[35] The Companies Act 1965 do not specifically provide for the separate legal personality of a company. Notwithstanding such drawback, it is appropriate to state that the whole scheme of the Companies Act 1965 is predicated upon the company's separate existence. It is the classic case of *Salomon (supra)* that establishes the separate legal personality of a company.

[36] The law may be stated as follows:

(a) once a certificate of incorporation has been issued by the Registrar of Companies, a company becomes a body corporate or better known as a corporation;

(b) a company can be defamed (*South Hetton Coal Company, Limited v. North-Eastern News Association Limited* [1894] 1 QB 133, CA, [1891-4] All ER Rep 548, CA, 10 TLR 110; and *Barnes & Co Limited and others v. Sharpe and others* [1910] 11 CLR 462);

(c) but a company cannot claim damages for injury to its feelings (*Rubber Improvement Ltd. and Another v. Daily Telegraph Ltd, Same v. Associated Newspapers Ltd.* [1964] AC 234, 262, HL);

(d) a company is a separate legal entity distinct from its members or directors (*Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor* [1997] 1 CLJ 529 FC);

A (e) a company is a "legal persona just as much as an individual" (per Cave J in *In re The Sheffield and South Yorkshire Permanent Building Society In Liquidation* [1889] 22 Ch 470, 476); and

(f) by the process of the law, a company can be dissolved.

B **[37]** At this juncture, it is ideal to narrate the relevant facts of the *Salomon* case.

[38] *Aron Salomon* had for many years carried on a prosperous business as a leather merchant and wholesale boot manufacturer C trading on his sole account. In 1892 he decided to convert the business into a limited company. And for this purpose, *"Aron Salomon and Company, Limited"* was formed with liability limited by shares. The memorandum of the company was subscribed by *Aron Salomon*, his wife and five of his children. It was all along the D intention of these persons to retain the business in their own hands. The company purchased the business for £39,000 and the price was satisfied by (a) a sum amounting to £20,000 was paid to *Aron Salomon* who immediately returned the money to the company in exchange for the fully paid shares; (b) a sum amounting to £10,000 E was paid in debentures for the like amount; and (c) the balance sum, with the exception of about £1,000 which *Aron Salomon* seemed to have received and retained, went in discharge of the debts and liabilities of the business at the time of purchase. The end result was this. That apart from the fully paid shares, *Aron Salomon* F received for his business about £1,000 in cash and £10,000 in debentures. A year after its incorporation, the company became insolvent and went into liquidation. In an action brought by a debenture holder on behalf of himself and all the other debenture holders, the company set out by way of counterclaim, *inter alia*, that G the company was a mere nominee and agent of *Aron Salomon* and that the company or the liquidator was entitled to be indemnified by *Aron Salomon* against all the debts owing by the company to creditors other than *Aron Salomon* himself. The main issue before the court was whether the debenture originally issued to *Aron* H *Salomon* was valid and therefore ranked in priority to unsecured creditors.

[39] Vaughan Williams J, the judge of the first instance, held that the company was only an "alias" or an "agent" for *Aron Salomon* I and because of that *Aron Salomon* was personally bound to pay the unsecured creditors of the company. The Court of Appeal affirmed

the decision of Vaughan Williams J but on different ground. The Court of Appeal considered the relation between the parties as trustee and *cestui que trust*. This difference of view did not affect the conclusion that the right of the indemnity claimed had been established against *Aron Salomon.*

[40] But the House of Lords unanimously reversed the decision of the Court of Appeal and held that *Aron Salomon* was not personally liable. Lord Macnaghten said (see p. 51 of the report):

> The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act.

[41] Earlier on at pp. 50 to 51, Lord Macnaghten had this to say:

> There is nothing in the Act requiring that the subscribers to the memorandum should be independent or unconnected, or that they or any one of them should take a substantial interest in the undertaking, or that they should have a mind and will of their own, as one of the learned Lord Justices seems to think, or that there should be anything like a balance of power in the constitution of the company.

[42] Lord Halsbury LC in *Salomon*'s case at p. 31 treated the company as a creature of statute and that what was done by *Salomon* was within the intention of the legislature as manifested by the statute. Thus, while the business was managed solely by *Salomon*, in law he and the company were separate persons. This separateness is an incident of the incorporation of a company notwithstanding that only one person effectively owns and controls it.

[43] In a nutshell, the rule in *Salomon*'s case laid down this classic principle of law. A company and the individual or individuals forming a company are separate legal entities, however complete the control might be by one or more of these individuals over the company. And *Salomon*'s case has been referred to in a number of cases, namely:

A (a) *Perbadanan Pembangunan Bandar v. Syabas Holdings Sdn Bhd* [1990] 1 CLJ 805; [1990] 2 CLJ (Rep) 614;

(b) *Hotel Jaya Puri Bhd. v. National Union of Hotel, Bar & Restaurant Workers & Anor* [1979] 1 LNS 32;

B (c) *Hew Sook Ying v. Hiw Tin Hee* [1992] 3 CLJ 1325; [1992] 1 CLJ (Rep) 120, SC;

(d) *Lam Shes Tong & Ors. v. Lam Kee Ying Sdn. Bhd.* [1972] 1 LNS 59, FC;

C (e) *Lam Kee Ying Sdn. Bhd. v. Lam Shes Tong & Anor.* [1974] 1 LNS 65, PC;

(f) *Yap Sing Hock & Anor v. Public Prosecutor* [1992] 4 CLJ 1950; [1992] 1 CLJ (Rep) 356 SC;

D (g) *Tan Tien Kok v. Medical Specialist Centre (JB) Sdn Bhd* [1994] 4 CLJ 597;

(h) *Chong Chin Kee v. Lee Song & Anor.* [1960] 1 LNS 13, HC;

E (i) *Re Salvage Engineers Limited* [1962] 1 LNS 167;

(j) *Koh Hoe Peng v. Central Development Ltd.* [1982] 1 LNS 77, CA;

(k) *Malaysia Shipyard & Engineering Sdn. Bhd. v. Bank Kerjasama*
F *Rakyat (M) Bhd.* [1985] 2 CLJ 427; [1985] CLJ (Rep) 206, SC;

(l) *Bank Bumiputra (M) Bhd. & Anor. v. Lorrain Esme Osman & Aspatra Sdn Bhd & Ors.* [1985] 1 CLJ 552; [1985] CLJ (Rep) 409;

G (m) *MBf Holdings Bhd. v. Emtex Corporation Bhd.* [1985] 1 LNS 100;

(n) *Aspatra Sdn. Bhd. & Ors. v. Bank Bumiputra (M) Bhd. & Anor.* [1987] 2 CLJ 377; [1987] CLJ (Rep) 50, SC;

H (o) *Malayan Banking Bhd v. The International Tin Council & Anor & Another Case* [1989] 2 CLJ 961; [1989] 1 CLJ (Rep) 87, SC;

(p) *Pek Seng Co Pte Ltd & Ors v. Low Tin Kee & Ors* [1989] 1 LNS 175;

I (q) *Tan Guan Eng & Anor v. Ng Kweng Hee & Ors* [1991] 3 CLJ 1881; [1991] 4 CLJ (Rep) 74;

(r) *Chong Siew Choong v. Public Prosecutor* [1996] 2 CLJ 823;

(s) *Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor* [1997] 1 CLJ 529 FC;

(t) *Kesultanan Pahang v. Sathask Realty Sdn Bhd* [1998] 2 CLJ 559, FC;

(u) *Pilba Trading & Agency v. South East Asia Insurance Bhd & Anor (supra)*; and

(v) *Lee Eng Eow (as director of Lee Guat Cheow & Co Sdn Bhd) v. Mary Lee (as executrix of the estate of Low Ai Lian) & Ors (supra)*.

[44] The argument that the veil of incorporation of TNBT must, in the interest of justice, be lifted was applied by this court in *Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors* [2005] 3 CLJ 355. Gopal Sri Ram JCA (later FCJ) speaking for this court had this to say at pp. 362 to 363:

> In my judgment, in the light of the more recent authorities such as *Adams v. Cape Industries Plc*, it is not open to the courts to disregard the corporate veil purely on the ground that it is in the interests of justice to do so. It is also my respectful view that the special circumstances to which Lord Keith referred include cases where there is either actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity. The former, that is to say, actual fraud, was expressly recognised to be an exception to the doctrine of corporate personality by Lord Halsbury in his speech in *Salomon v. A Salomon & Co Ltd* [1897] AC 22, the seminal case on the subject. For, this was what the Lord Chancellor said:
>
> > I am simply here dealing with the provisions of the statute, and it seems to me to be essential to the artificial creation that the law should recognise only that artificial existence? Quite apart from the motives or conduct of individual corporators. In saying this, I do not at all mean to suggest that if it could be established that this provision of the statute to which I am adverting had not been complied with, you could not go behind the certificate of incorporation to shew that a fraud had been committed upon the officer entrusted with the duty of giving the certificate, and that by some proceeding in the nature of scire facias you could not prove the fact that the company had no real legal existence. But

> short of such proof it seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.

A good illustration of equitable fraud as a ground for piercing or disregarding the corporate veil is *Jones v. Lipman* [1962] 1 All ER 442. In that case, the first defendant after agreeing to sell his property to the plaintiffs for £5,250 sold and transferred it to a company of which he and his solicitors' clerk were shareholders and directors for £3,000. The plaintiffs sued for and obtained a decree of specific performance against the company of which Russell J (later Lord Russel of Killowen) said:

> The defendant company is the creature of the defendant, a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity ... an equitable remedy is rightly to be granted directly against the creature in such circumstances.

In *Sunrise Sdn Bhd v. First People (M) Sdn Bhd* [1997] 1 CLJ 529, Chong Siew Fai (CJ, Sabah & Sarawak) said that in:

> cases where there are signs of separate personalities of companies being used to enable persons to evade their contractual obligations or duties, the court would disregard the notional separateness of the companies.

His Lordship was there, of course, referring to the legal basis upon which judicial intervention has occurred in cases such as *Jones v. Lipman*.

In the present appeal, it is not the plaintiffs' case that special circumstances exist here indicating that Boltex is a mere facade concealing the true facts. Nor was a case of actual or equitable fraud raised on the pleading. It is therefore of no avail to the plaintiffs to say without more that this is a case for piercing the corporate veil. They simply did not lay any evidential foundation to support that plea. On the basis of current authority there is therefore no justification whatsoever in law to pierce the corporate veil of Boltex for the purpose of treating its property as the property of the second to the sixth defendants.

[45] Learned counsel for the respondents argued that the respondents' cause of action in the present suit against the appellant (TNB) is entirely distinct and separate from the arbitration and the

Shah Alam suit. The stand of the respondents was this. That the appellant (TNB) is legally responsible for the payment of the final award to the respondents. It was argued that once the corporate veil of TNBT was lifted it would show that the appellant (TNB) had, *inter alia*, fraudulently used TNBT as its contracting vehicle in all its dealings with the respondents.

[46] Learned counsel for the respondents relied on the case of *Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor* [1997] 1 CLJ 529, FC, particularly to a passage in the judgment of Chong Siew Fai CJ (Sabah & Sarawak) at p. 537:

> We are in complete agreement with the basic principle of the fundamental attribute of corporate personality, ie, that the corporation is a legal entity distinct from its members, be they individuals or corporate bodies – a principle firmly established since *Salomon v. Salomon & Co.* [1897] AC 22 HL. However, since then, the development of the law has seen numerous deviations from the strict rule of the separate legal entity of the company through cases where the Courts, on the particular facts and circumstances of those cases, found it appropriate and necessary to depart. Thus in cases where there are signs of separate personalities of companies being used to enable persons to evade their contractual obligations or duties, the Court would disregard the notional separateness of the companies.

[47] Reference to the Supreme Court case of *Yap Sing Hock & Anor. v. Public Prosecutor* [1993] 1 BLJ 35, was also made by the learned counsel for the respondents. The following passages in the judgment of Peh Swee Chin SCJ at p. 43 were referred to:

> The category for such purposes for which the Court will lift the veil is never closed. A court has always the discretion to have a crack at it to do justice.
>
> It will be argued that to do justice will involve doing justice to an Accused person whose liberty is imperilled and whose innocence is presumed until proven guilty. However the legal position is far more intricate than this simple argument suggests.
>
> All the cases for which the Courts have lifted the veil to do justice seem to be civil cases or due to illegal and improper purposes directed against the third parties or outsiders to the companies in question who have or would have suffered damage but for the lifting of such veil. In each of those cases, it would seem that the company in question has been used as an engine of fraud or wrongful deprivation, etc.

[48] With respect, *Sunrise Sdn Bhd* and *Yap Sing Hock* can readily be distinguished. The plaintiffs in those two cases clearly had an existing cause of action against the holding company. Here, in the instant appeal, it is crystal clear that the existing cause of action was against TNBT – a subsidiary, but the respondents are now seeking to impose liability on the appellant (TNB) – the holding company, and this is untenable in the circumstances of the case.

[49] You cannot simply raise the veil of incorporation just because you feel that it is in the interest of justice. But if there is fraud, then the veil of incorporation may be lifted. But here, there was no fraud at all.

[50] Paragraph 54 of the respondents' statement of claim at p. 74 of the appeal record at Jilid 1 states that the appellant (TNB) is the directing mind of TNBT. With respect, that averment is insufficient to trigger the lifting of the veil of incorporation. And right from the very beginning the respondents said that the appellant (TNB) played a prominent role. This cannot be right because the five agreements were contracts between the respondents and TNBT. There was thus no veil to be lifted. Everything was there to be seen and appreciated. Nothing was hidden. Everything was transparent.

[51] At para. 56 of the statement of claim at p. 74 of the appeal record at Jilid 1, the respondents pleaded what they said to be fraud. However, the word "fraud" does not mean anything more than what is stated. When you plead fraud, the particulars must be pleaded. Since there was no liability on the part of the appellant (TNB) to pay the award handed down by the arbitrator, then the plea of fraud must necessarily fail. When fraud has been pleaded, that warrants a strict scrutiny of the pleadings. Here, on the facts, there was no fraud at all. In *Wong Yew Kwan v. Wong Yu Ke & Anor* [2010] 2 CLJ 703, this court said that "mere general allegations of fraud are insufficient to constitute a pleaded case of fraud." For completeness, we shall reproduce verbatim the judgment of Gopal Sri Ram JCA (later FCJ) as reflected at p. 712 of the report:

> In my judgment the learned judge was entirely correct in striking out the appellant's pleading as being plainly and obviously unsustainable. Both principle and authority favour her decision. First the principle. It is to be found in s. 340(1) of the National Land Code to which she adverted in her judgment. That section

immunises the title of a registered proprietor from impeachment save in the limited circumstances that are housed in sub-s. (2), namely, registration that has been occasioned by fraud or forgery or by an insufficient or void instrument. In the present case, the appellants sought to rely on the fraud exception. But, as correctly pointed out by the learned judge, mere general allegations of fraud are insufficient to constitute a pleaded case of fraud. As Lord Hatherley said in *Wallingford v. Mutual Society* [1880] 5 App Cas 685:

> There is the question of fraud upon which I said I should touch in one moment. Now I take it to be as settled as anything well can be by repeated decisions, that the mere averment of fraud, in general terms, is not sufficient for any practical purpose in the defence of a suit. Fraud may be alleged in the largest and most sweeping terms imaginable. What you have to do is, if it be matter of account, to point out a specific error, and bring evidence of that error, and establish it by that evidence. Nobody can be expected to meet a case, and still less to dispose of a case, summarily upon mere allegations of fraud without any definite character being given to those charges by stating the facts upon which they rest.

[52] Now, at para. 56 of the statement of claim at p. 74 of the appeal record at Jilid 1, the respondents suggested that the appellant (TNB) had used TNBT since its inception as a contracting vehicle to commit fraud. If such allegations were true (the appellant (TNB) here has denied it vehemently), then the respondents would have been aware of the alleged fraud at the time the five agreements were entered or at the latest at the time when the original suit was filed. Yet the respondents had elected to affirm the validity of the five agreements and pursue the matter by way of an arbitration proceedings against TNBT solely.

[53] We are of the view that to allow the respondents to enforce the final award against the appellant (TNB) would be unjust and an abuse of the process of the court. The learned judge of the High Court made a wrong finding when he held that TNBT was used by the appellant (TNB) to "evade liability" without the benefit of oral evidence.

[54] The particulars of fraud at pp. 74 to 75 of the appeal record at Jilid 1 were nothing more than a mere rehash of what the respondents already knew. The respondents knew that TNBT was

involved. The respondents registered the award of the arbitrator against TNBT before the High Court. While the appellant – TNB, said that they are not liable for the award against TNBT.

[55] It must be borne in mind that the appellant – TNB, did not pinch assets or remove assets of TNBT. No plea was ever made by the respondents to show that the appellant (TNB) made a representation that the appellant (TNB) will honour the award of the arbitrator. Of crucial importance is this. That the appellant (TNB) did not give an undertaking to the respondents that the appellant (TNB) would honour the award of the arbitrator.

[56] The learned judge of the High Court in his written judgment at p. 30 of the appeal record at Jilid 1 said that:

> The defendant is not an ordinary corporation. It is recognised as an institution not only by the state but also by the public for whatever essential service it provides. It is pertinent for the defendant at all times to demonstrate good corporate governance, accountability and transparency. The courts will not ordinarily allow such institution to avoid liability by circuitous arguments when the plaintiffs' *prima facie* has an arguable case.

[57] With respect, there is no question of members of the public being involved. And words like "good corporate governance, accountability and transparency" are not concepts of law.

[58] The respondents knew who were involved in the arbitration proceedings. The High Court seems to think that the appellant (TNB) is hiding behind the skirts of TNBT. These are strong words. But it is not the law.

[59] The High Court relied on *Sunrise Sdn Bhd (supra)* but that case has been distinguished by us earlier.

[60] Even assuming for a moment that TNBT is not in a position to pay for the award, does that mean that the appellant (TNB) being the holding company has to be liable. We just cannot ignore the rule laid down by the *Salomon*'s case. We just cannot throw out *Salomon*'s case out of the window and pretend that it is not there. We are not prepared to depart from the rule in *Salomon*'s case. We are aware of the speech of Lord Denning MR in *Littlewoods Mail Order Stores Ltd. v. Inland Revenue Commissioners, Same v. McGregor (Inspector of Taxes)* [1969] 1 WLR 1241, at p. 1254, CA, [1969] 3 All ER 855, at p. 860, CA, where his Lordship said:

> The doctrine laid down in *Salomon v. Salomon & Co.* [1897] AC 22, has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can and often do draw aside the veil. They can, and often do, pull off the mask. They look to see what really lies behind.

[61] We categorically say that those who have chosen the benefits of incorporation must bear the rigours of the rule in *Salomon*'s case. And those who deal with a company should likewise be well aware of the rule in *Salomon*'s case.

[62] If the appellant (TNB) is held liable to make payment to the respondents for the award against TNBT then the rule in *Salomon*'s case will be relegated into oblivion. The facts of the present appeal do not permit us to depart from the rule in *Salomon*'s case.

[63] Unless the statute states otherwise, the principle that the separate legal entities with all the rights and liabilities would normally attach to separate legal entities cannot be overlooked. The individuals that form the company and the company itself are separate legal entities.

[64] It is undeniable that the appellant (TNB) is entitled to use the corporate structure of setting up and using TNBT as a subsidiary to enter into a contract. It is perfectly legitimate and nothing sinister can be read into it. Whether it is morally wrong or otherwise is totally immaterial.

[65] We will now examine the issue of estoppel by election. The respondents are estopped from bringing the present action. The respondents had two possible actions in the original suit. The first option was to both defend the original suit and to file a counterclaim against TNBT and the appellant (TNB). The second option was to stay the original suit and refer the matter to arbitration. The respondents elected to proceed with the second option when they filed a stay of the proceedings between them and the appellant (TNB) and in regard to the tussle with TNBT, the respondents decided to refer the dispute to arbitration.

[66] We say that in seeking for the stay, the respondents have elected to affirm the validity of the five agreements. The effect of such an election meant that:

(i) the appellant (TNB) was deprived from proceeding with its cause of action against the respondents in the original suit since the matter was stayed; and

(ii) the appellant (TNB) was also deprived of the opportunity to participate in the arbitration proceedings.

[67] Now, the respondents took a different stand. The respondents say that the five agreements were fraudulently procured. In the same breath, the respondents seek to impose the benefits of the final award against the appellant (TNB) who was deprived of the right to argue or participate in the arbitration proceedings. Since there was a breach of the principles of natural justice, the appellant (TNB) submitted that the respondents are now estopped from bringing this action because of their election.

[68] At this juncture, we need to refer to three salient authorities on the subject of estoppel by election. The first would be the case of *Meng Leong Development Pte Ltd v. J.I.P Hong Trading Co. Pte. Ltd* [1985] 1 CLJ 20; [1985] CLJ (Rep) 8, a decision of the Privy Council. Lord Templeman, delivering the majority judgment of the court made reference to a textbook. At p. 11, this was what Lord Templeman said:

> 11. In Spencer, Bower and Turner *'The Law relating to Estoppel by Representation'* 3rd Edition (1977) paragraph 310 summarises the doctrine of election as applied to the law of estoppel in these terms:
>
> > Where A, dealing with B, is confronted with two alternative and mutually exclusive courses of action in relation to such dealing, between which he may make his election, and A so conducts himself as reasonably to induce B to believe that he is intending definitely to adopt the one course, and definitely to reject or relinquish the other, and B in such belief alters his position to his detriment, A is precluded, as against B, from afterwards resorting to the course which he has thus deliberately declared his intention of rejecting. It is of the essence of election that the party electing shall be 'confronted' with two mutually exclusive courses of action between which he must, in fairness to the other party, make his choice.

[69] The second would be the case of *Nagubai Ammal and Others v. B. Shama Rao and Others* [1956] AIR SC 593, SC, a decision of Venkatarama Ayyar J. There at pp. 601 to 602, his Lordship had this to say:

Not having obtained satisfaction, the principal next filed a suit against the agent for damages on the ground of negligence and breach of duty. It was held that such an action was barred. The ground of the decision is that when on the same facts, a person has the right to claim one of two beliefs and with full knowledge he elects to claim one and obtains it, it is not open to him thereafter to go back on his election and claim the alternative relief. The principle was thus stated by Bankes, LJ:

> Having elected to treat the delivery to him as an authorised delivery they cannot treat the same act as a misdelivery. To do so would be to approbate and reprobate the same act.

The observations of Scrutton, LJ on which the appellants rely are as follows:

> A plaintiff is not permitted to 'approbate and reprobate'. The phrase is apparently borrowed from the Scotch law, where it is used to express the principle embodied in our doctrine of election – namely, that no party can accept and reject the same instrument: *Ker v. Wauchope* [1819] 1 Bligh 1 (21) (E): *Douglas-Menzies v. Umphelby* [1908] AC 224 (232) (F). The doctrine of election is not however confined to instruments. A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction.

It is clear from the above observations that the maxim that a person cannot 'approbate and reprobate' is only one application of the doctrine of election, and that its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto. The law is thus stated in *Halsbury's Laws of England*, Volume XIII, p. 454, para 512:

> On the principle that a person may not approbate and reprobate, a species of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel in pais, and may conveniently be referred to here. Thus a party cannot, after taking advantage under an order (eg, payment of costs), be heard to say that it is invalid and ask to set it aside, or to set up to the prejudice of persons who have relied upon it a case inconsistent with that upon which it was founded; nor will he be allowed to go behind an order made in ignorance of the true facts to the prejudice of third parties who have acted on it.

> The plaintiff obtained no advantage against the appellants by pleading in O.S. No. 92 of 1938-39 that the proceedings in O.S. No. 100 of 1919-20 were collusive; nor did they acting on those pleadings acquire rights to the suit properties. Nor is there any question of election, because the only relief which the plaintiff claimed in O.S. No. 92 of 1938-39 and which he now claims is that he is entitled to the suit properties. Only, the ground on which that relief is claimed is different and, it is true, inconsistent. But the principle of election does not forbid it, and there being no question of estoppel, the plea that the proceedings in O.S. No. 100 of 1919-20 are not collusive is open to the plaintiff.

[70] The third would be the case of *Lion Engineering Sdn Bhd v. Pauchuan Development Sdn Bhd* [1998] 3 CLJ Supp 450, a decision of Dato' Abdul Malik bin Ishak while he was sitting on the High Court bench. In that case he spoke of the maxim that a person cannot "approbate and reprobate" and in doing so he referred to the decision of Venkatarama Ayyar J in *Nagubai Ammal and others v. B Sharma Rao and others (supra)*. And at p. 478 of the report, this was what he said:

> (iii) the plaintiff approbates and reprobates in the following manner. Under examination-in-chief, Mr. Tan was referred to the letter from the architect to the defendant dated 2 April 1990 as seen at page 130 of bundle 'PBD' (incidentally this letter was challenged by the defendant) and Mr. Tan accepted the contents of this letter as gospel truth. Ironically, Mr. Tan refused to accept the letter at page 132 of bundle 'PBD' which bore the same date ie, 2 April 1990, and this was the letter from the architect to the plaintiff where the architect itemised the LAD at RM155,648.00.

[71] Estoppel by election is related to the principle that a person may not approbate and reprobate (*Lissenden v. C.A.V. Bosch, Limited* [1940] AC 412 at 417, 418, HL, [1940] 1 All ER 425 at 429 HL). Thus, a person having a choice between two courses of conduct is to be treated as having made an election from which he cannot resile. But the person will not be regarded as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent with his election (*Banque des Marchands de Moscou (Koupetschesky) v. Kindersley and Another* [1951] Ch 112 at 119, 120, [1950] 2 All ER 549 at 552, CA; *Ex parte Robertson, In re Morton* [1875] LR 20 Eq 733; and *Evans v. Bartlam (supra)*).

[72] According to Sir Raymond Evershed MR in *Rosenfeld v. Newman and Others* [1953] 2 All ER 885 at 887, CA [1953] 1 WLR 1135 at 1139, CA, an election, if it is to be binding, must be clearly and unequivocally made. A

[73] In *The King v. Taylor, The King v. Amendt* [1915] 2 KB 593, a person who had, upon his own application and for his own purposes and profit, obtained a licence and made use of it, was not allowed subsequently to contend that it was void. B

[74] In *Verschures Creameries, Limited v. Hull and Netherlands Steamship Company, Limited* [1921] 2 KB 608, CA, the owners of goods, having elected to treat a delivery of goods by their agent to a wrong consignee as an authorised delivery by suing the consignee for the price of the goods, precluded from suing their agent for misdelivery. C D

[75] In *Re Fletcher's Settlement Trusts, Medley v. Fletcher* [1936] 2 All ER 236, at 239 to 240, a person claiming something under a will is put to his election only if that which is claimed is bounty.

[76] After taking advantage under an order, a party may be precluded from saying that it is invalid and asking to set it aside (*Tinkler v. Hilder* [1849] 4 Exch 187; and *Mills v. Duckworth* [1938] 1 All ER 318 at 320, CA). E

[77] If a person is entitled to one of two inconsistent rights, as opposed to having a choice between two alternative remedies (*United Australia, Limited v. Barclays Bank, Limited* [1941] AC 1 at 29, HL, [1940] 4 All ER 20 at 37, HL), and, with an open mind and with full knowledge he does an unequivocal act showing that he has chosen one, he cannot afterwards pursue the other (*Slough Estates, Ltd. v. Slough Borough Council and Another (No. 2)* [1969] 2 Ch 305, CA, [1969] 2 All ER 988, CA). F G

[78] All these are mere examples. And there are many more in the law journals.

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[79] Be that as it may, the issue of estoppel by election is further compounded by the fact that the appellant (TNB) had accepted that the dispute was between TNBT and the respondents and that dispute would be determined by arbitration proceedings between those parties only. And if the appellant (TNB) had been alerted or I

would have known that the appellant (TNB) would be penalised by being asked to pay for the final award of the arbitrator, the appellant (TNB) would have defended itself in the arbitration proceedings. With respect, this point was overlooked by the learned judge of the High Court completely. His Lordship erred when he held the view that the arbitration proceedings were held between the correct parties and he also failed to consider that there was a complete denial of natural justice to the appellant (TNB) as the appellant (TNB) was not a party to the arbitration proceedings.

[80] Since the appellant (TNB) was not a party to the arbitration proceedings, the appellant (TNB) was not present and it did not participate in that proceedings. The appellant (TNB) cannot therefore be asked to pay for the final award handed down by the arbitrator. There was a clear breach of natural justice.

[81] The opportunity to be heard normally calls for an oral hearing and such hearings are modelled along the lines employed by the courts. This was not accorded to the appellant (TNB) for the simple reason that the appellant (TNB) was not a party to the arbitration proceedings.

Conclusion

[82] For the reasons adumbrated above, we unanimously allowed the appellant's (TNB's) appeal with costs of RM10,000. The decision of the learned judge of the High Court was set aside. Deposit to be refunded to the appellant (TNB).